



Posted on: October 3, 1998

THE ART OF NEGOTIATION: BASIC STRATEGIES FOR SUCCESSFUL NEGOTIATION

The Successful Personal Injury Practice

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I presented a talk on this topic at a Trial Lawyers Seminar in 1993. When I reviewed my paper, I realized that the key points haven't changed. I have added several points which I hope you will find to be valuable.

Trial Lawyers always brag about how they were only offered \$10,000.00 on a case and went to trial and got \$50,000.00. In their own mind, this shows that they are great trial lawyers. However, it may show that they are very poor negotiators!

If the case is worth \$50,000.00 in the mind of a judge, why could not the adjuster and/or defence counsel be convinced that it was worth \$50,000.00?

The lawyer who is offered \$55,000.00 and goes to trial and gets \$50,000.00 is probably just as good a trial lawyer, but obviously a much better negotiator. Some of the things I try to do when negotiating on behalf of a Plaintiff are as follows:

1. Never discuss figures with your client "off the top of your head" or before your client is fully recovered or reached a plateau.
2. Be realistic with your client. Do not build up false expectations. You want to be doing battle with the adjuster or defence counsel, not your own client.
3. Make a detailed written proposal. In it, stress your client's subjective complaints. Do not simply quote from the medical reports.
4. Overstating your case in a settlement proposal is dangerous. Try to stick to things you know you can prove. If defence counsel senses exaggeration he/she will seize on it.
5. "If you want peace, prepare for war" - to achieve good settlements the other side must understand that you are ready, able and willing to go to court.
6. Be prepared for trial before entering negotiations and make sure the other side can see how



- prepared you are. Bound and tabbed medical reports and records, a brief of authorities, summaries of witness statements, etc. can all be provided to the other side with a settlement proposal.
7. Negotiating is like juggling, the idea is to keep as many balls in the air as possible. I try to break down the components of my settlement proposal and keep them broken down throughout the discussion: by doing that you have more areas where you can make and gain concessions.
 8. Don't be a jerk. Don't motivate the other side to not want to settle, or to stick to a very tough position to "teach you a lesson".
 9. Listen to what the other side is saying. Make sure that you and your client fully understand the weaknesses in your case. Take these weaknesses into account when evaluating your position. Be prepared to deal with them at the negotiation phase. Don't ignore them.
 10. Be prepared to walk away. You never want to be in a position where you have to settle. If you are in that position, never let the other side know. On the other hand, never walk away too early. Try to keep talking, and listening.
 11. Decide who you want to negotiate with, the adjuster or defence counsel. Advantages of dealing with adjuster: (a) writes the cheque, (b) may be very conscious of defence counsel costs. Advantages of dealing with defence counsel: (a) better able to assess risks.
 12. Make sure the other side understands the nature of your claim as early as possible. If you are going to advance a significant claim for loss of capacity and future care, etc., make sure the other side is anticipating that well before you start negotiating so that they will not be taken completely by surprise. If they have locked into the concept that your claim is worth \$30,000 and you think it is worth \$300,000., you will have a difficult time getting them to change their minds at the last minute. Your job will be much easier if they are anticipating a claim in that range early on.
 13. Full disclosure is essential. If the other side feels that something is hidden, their natural response will be extreme caution. I recommend full disclosure even if you believe the other side is hiding something. It is important that the other side trusts you. If you undermine your own credibility by making completely unrealistic offers, or asserting that a witness will say something that the witness backs away from, it is unlikely that you will be treated seriously in negotiations.
 14. Always try to leave the other side a way to get out of a "final" position without losing face. You might do this by bringing costs into the mix at the end of the negotiation, or by keeping an illustration or point of argument in reserve which may give a "dug in" opponent a rational excuse to move a bit.